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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. ~~968, 969~~ 63-64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT, AND F. H. NEMITZ, SENIOR VICE PRESIDENT, AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT, AND S. R. HARVEY, ASSISTANT PRESIDENT, *Petitioners*,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES, AND J. M. COX, *Respondents*, AND RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, AND SOUTHERN PACIFIC COMPANY, *Intervenors-Respondents*.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, *Petitioners*,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES, AND J. M. COX, *Respondents*, AND RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, AND SOUTHERN PACIFIC COMPANY, *Intervenors-Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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April 8, 1946.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 152 F.2d 325 (December 21, 1945).

STATUTE INVOLVED.

The Railway Labor Act, as amended in 1934, provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions shall be handled on the property of the carrier concerned and, if unadjusted, may be referred to "the appropriate division of the Adjustment Board." 45 U. S. C., Sec. 153 First (i). The carriers and the national labor organizations are authorized to select their respective representatives on the Adjustment Board and to designate the division on which each such representative shall serve. 45 U. S. C., Sec. 153 First (b) and (c).

The question in this case involves the jurisdiction of the First and the Fourth Divisions of the Adjustment Board over disputes involving yardmasters. Section 3 First (h) of the Act, 45 U.S.C., Sec. 153 First (h), which defines the respective jurisdictions of the four divisions of the Adjustment Board, is set forth in full in the appendix to this brief (*infra*, page 23).

QUESTION PRESENTED.

The question presented is whether the First or the Fourth Division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters, which in turn depends upon whether yardmasters are or are not included within the term "yard-service employees" as used in Section 3 First (h) of the Railway Labor Act.

STATEMENT OF THE CASE.

The National Railroad Adjustment Board was created by Section 3 of the Railway Labor Act in 1934. The first awards of the Board were issued in 1935.[1] This case is the outgrowth of a difference of opinion that arose in the very first days of the Board, and that has remained unsettled ever since, over the jurisdiction of the First and the Fourth Divisions of the Adjustment Board with respect to disputes involving railroad yardmasters.

The jurisdiction of each division of the Board is specifically defined in Section 3 First (h) of the Act. We are concerned here only with the First and the Fourth Divisions, since it is admitted that disputes involving yardmasters are not assigned to the Second or the Third Division. The First Division has jurisdiction over disputes involving

> "train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees."

It will be noted that yardmasters are not specifically mentioned. The Fourth Division has jurisdiction over disputes involving employees of marine carriers,

> "and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions."

Yardmasters are included in the membership of several labor organizations. The largest group is in the inter-

[1] The awards are published by the National Railroad Adjustment Board in four series of bound volumes, one series for each of the four divisions. Award No. 1, First Division, is dated April 4, 1935, and Award No. 1, Fourth Division, is dated March 29, 1935.

venor-respondent, Railroad Yardmasters of America, a labor organization national in scope. Yardmasters employed by 30 rail carriers, having 52% of the total railroad mileage of the country, are represented by that organization. Other labor organizations, exclusive of petitioners, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, include within their membership yardmasters employed by 22 rail carriers having 17% of the total railroad mileage. Yardmasters employed by 15 carriers, with 13% of the total railroad mileage, are represented by petitioner, Brotherhood of Railroad Trainmen,[1] and yardmasters employed by 9 carriers, with 6% of the total railroad mileage, are represented by petitioner, Order of Railway Conductors. Considering only the mileage of railroads having yardmaster representation, the intervenor-respondent, Railroad Yardmasters of America, has 60% of the represented mileage, other labor organizations exclusive of petitioners have 18%, the Brotherhood of Railroad Trainmen has 15%, and the Order of Railway Conductors has 7%. R. 161-162.[2]

The Railroad Yardmasters of America is, as its name indicates, an organization of yardmasters, a restricted class of railroad employees, their work being wholly supervisory in character. R. 162-163. Within the Order of Railway Conductors and the Brotherhood of Railway Trainmen, which are two of the so-called "big four" organizations of railroad employees, the yardmaster members are a small minority, the main membership of those organizations consisting of conductors, en-

[1] The table at R. 162 should show 15 carriers for the Brotherhood of Railroad Trainmen, as per the original stipulation, but by misprint it shows only 11.

[2] The statistics given are as of July 8, 1942, the date of the stipulation. R. 170.

gineers, firemen, brakemen, switchmen, and hostlers.[1] The members of those crafts who are employed in yard service are subordinate and subject to the supervision and discipline of yardmasters.[2]

The petitioners, Order of Railway Conductors and Brotherhood of Railroad Trainmen, have and always have had representatives on the First Division of the Adjustment Board, which hears disputes involving train-service and yard-service employees; the intervenor-respondent, Railroad Yardmasters of America, has never secured member representation on either the First Division, or the Fourth, or any other division of the Adjustment Board. R. 156-157.

In the absence of specific assignment under the Act, the Railroad Yardmasters of America and the railroads have taken the position from the beginning that disputes involving yardmasters, like those of various other supervisory employees whose disputes are not specifically assigned to some other division, are subject to the catch-all jurisdiction of the Fourth Division. The Railroad Yardmasters of America submitted a dispute involving yardmasters to the Fourth Division in 1935,[3] but in deference to the position of petitioners' representatives on the Adjustment Board, the labor members of the Fourth Division produced a deadlock on the question of jurisdiction. The same action was taken on three yardmaster disputes submitted to the Fourth Division in March 1938. R. 157-158. Thereupon, the Railroad Yardmasters of America filed suit in the District Court of the United States for the

[1] *Report to the President by the Emergency Board appointed May 31, 1943 pursuant to the Railway Labor Act*, dated September 25, 1943, pp. 13-14, n. 2.

[2] R. 162-166.

[3] First Annual Report of the National Mediation Board, including the Report of the National Railroad Adjustment Board, for the fiscal year ended June 30, 1935, p. 58; see also Second Annual Report, p. 46, and Third Annual Report, p. 34.

Northern District of Illinois, Eastern Division, for a judgment holding yardmaster disputes to be subject to the jurisdiction of the Fourth Division. A decree in its favor was rendered July 1, 1938. R. 158, 171-181.[1] Comparatively few yardmaster disputes arise, but ever since that decree the Fourth Division has regularly accepted yardmaster submissions from the Railroad Yardmasters of America and other yardmaster organizations, including one from the Order of Railway Conductors.[2]

In 1937, the First Division, which disposes of approximately one thousand disputes a year and is years behind in its docket,[3] decided two yardmaster disputes on the

[1] It is stated on page 3 of the petition for certiorari that this decree was "induced by collusion of the parties and without any consideration of the issues involved." The earlier decree was given no effect by the District Court in reaching the decision in this case, and the matter is referred to by petitioners only because it is deemed prejudicial. It should be noted, we think, that the same judge who entered the first decree, and criticized it for the reason stated, was the trial judge in the instant case.

The defendants in the 1938 case were all of the members of the Fourth Division, both the carrier members and the labor members. The defendants did not contest the entry of judgment as prayed in the complaint, and judgment was entered. In its memorandum opinion herein the trial judge stated (R. 224):

> "The court was not advised that there was a public question involved or that anyone aside from the parties had any interest in the question presented."

The court further stated (R. 224):

> "In my opinion I am not bound by that decree in this or any other case where there is a real contest, a decree which it appears I was induced to enter by collusion of the parties and without any consideration of the issues involved."

The trial judge (Holly) having thus found that he was not bound by his earlier decree, proceeded to decide the issue presented to him here solely on the record made at the trial of this cause. R. 223-224.

[2] See Annual Reports of the National Mediation Board, including Reports of the National Railroad Adjustment Board, 1939 *et seq.*

[3] As shown by the Annual Reports of the National Board, including the Reports of the National Railroad Adjustment Board

merits, without consideration or discussion of the jurisdictional question.[1] Early in 1938, however, the presence of the jurisdictional issue being noted by the members of the division, they deadlocked on four yardmaster cases. This action was followed by the decree of July 1, 1938 mentioned in the preceding paragraph. On August 18, 1938 the Order of Railway Conductors joined with the Great Northern Railway Company in submitting a yardmaster dispute to the Fourth Division, but within a fortnight it withdrew and submitted the matter to the First Division. The carrier refused to join in this action and filed an objection to the jurisdiction of the First Division. No award has ever been rendered. R. 158, 159, 160. A submission made to the First Division in January 1941 by the Brotherhood of Railroad Trainmen, against which the Southern Pacific Company, the employer of the yardmaster involved, filed a similar objection, has also remained in the First Division unsettled. R. 159-160.

In January 1942, petitioners asked for a declaratory judgment holding disputes involving yardmasters to be referable exclusively to the First Division of the Adjustment Board. R. 2-10. The defendant carrier members of the First and Fourth Divisions, and the intervenors, Railroad Yardmasters of America, Great Northern Railway Company, and Southern Pacific Company, all prayed for a declaratory judgment holding disputes involving yardmasters to be subject to the exclusive jurisdiction of the Fourth Division. R. 93-104, 109-118, 126-127, 135-144. After a trial, the District Court held that the Fourth Division had exclusive jurisdiction, and on appeal the Circuit Court of Appeals affirmed the judgment of the District Court. R. 229-234, 271-280.

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[1] Award 1649, January 21, 1937 (yardmaster complaining of demotion), and Award 1896, April 14, 1937 (yardmasters complaining of displacement by other yardmasters). Each award recites, in the stereotyped language found in all First Division awards: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

ARGUMENT.

Foreword.

Respondents believe that the statute gives exclusive jurisdiction over disputes involving yardmasters to the Fourth Division. The District Court and the Circuit Court of Appeals have so held on substantial evidence and after full hearing. The problem of statutory construction presented by the case is relatively simple. After thorough consideration by the two courts below, both reached the same conclusion, and the case is not of sufficient importance, we suggest, to merit review by this Court.

Representatives of the rail carriers will participate in the determination of yardmaster disputes whether such disputes are referable to the First or the Fourth Division.[1]

[1] On page 5 of the petition for certiorari, petitioners state:

> "The decision throws the disputes of an important *rail* craft to a board composed of representatives of *water* carriers and *maritime* unions contrary to the basic object of this section of the Railway Labor Act."

The reference to the Fourth Division as being "composed of representatives of water carriers and maritime unions" is inaccurate. The three carrier members of that division are representatives of railroad carriers, not water carriers, and the selection of the labor members is entirely in the hands of the national labor organizations. Section 3 First (b) and (c). In the courts below petitioners made similar statements as the basis for arguing, as is here implied, that the Fourth Division was not qualified by experience to handle railroad disputes. The intervenor, Railroad Yardmasters of America, which represents the majority of that craft, does not share that view, and the plain terms of the statute give that division a catch-all jurisdiction of all railroad disputes not assigned to the first three divisions. The fact is that while the Fourth Division does have jurisdiction over maritime disputes as well as its catch-all jurisdiction of railroad disputes, the annual reports of the Board show that since its inception more than 90% of the disputes determined by the Fourth Division were disputes arising in the railroad field.

No fear of inadequate protection of their interests in either event disturbs the respondents, and no question of prestige is involved so far as they are concerned. The case is essentially a contest between rival labor groups and may, for them, involve other considerations.

On the one side, insisting upon the exclusive jurisdiction of the First Division, are the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. These large organizations include in their vast membership many train- and yard-service employees, but only a comparatively few yardmasters. Representatives of the Conductors and the Trainmen sit on the First Division, to which the disputes of the bulk of their membership are submitted. Throughout this case these organizations have argued that yardmasters' disputes should be submitted to the First Division either because yardmasters are closely associated with yard-service employees, in that they supervise their work, or because yardmasters are, according to the argument of these organizations, one of the classes of employees embraced within the general term "yard-service employees" as used in the statutory definition of the First Division.

The Railroad Yardmasters of America has thus far successfully resisted the efforts of its two great opponents, which both have representatives on the First Division, to gather all yardmaster disputes into that division. The intervenor organization has, in fact, no member representation on any division of the Board, notwithstanding the fact that it is a labor organization national in scope. R. 157. It is, of course, a much smaller and less powerful organization, confining its membership to yardmasters, but within its restricted field it represents yardmasters on 60% of the represented railroad mileage, several times as many as either of the petitioners.

The position of the Railroad Yardmasters of Amer-

ica on the construction of the statute is that yardmasters are by definition excluded from the class of yard-service employees, or yardmen, and that since the disputes of yardmasters are not given to the First Division they are subject to the jurisdiction of the Fourth Division by the express terms of the statute, which gives that division a residual or catch-all jurisdiction over disputes not assigned to the others.

Oral Testimony On the Meaning of the Term "Yard-Service Employees."

When this case was tried before the District Court, the carriers and the Railroad Yardmasters of America offered both oral and documentary evidence of the meaning of the term "yard-service employees," a term of long usage and of well-recognized meaning in the railroad field. Three railroad officials of long experience testified on the meaning of the term in railroad usage. The first witness, whose testimony was corroborated by that of the other two, stated (R. 191) that the term "yard-service employees"

> "refers to certain employees who make up and break up trains in yards within defined limits.
>
> "They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed."

The witness testified further that the term had been used in the railroad business for as long as he could remember to distinguish the employees in yard service, namely, engineers, firemen, conductors or engine foremen, and brakemen or switchmen, from similar employees engaged in the operation and switching of trains outside yard limits, who are on a different basis of pay. He stated

that yardmasters have never been known as yard-service employees. R. 191.

On direct examination, the one witness offered by the petitioners stated his view of the meaning of "yard-service employees" and in no way did he contradict the meaning assigned to the term by the carriers' witnesses. R. 211. In fact, the witness conceded that yardmasters are not actually included in the term "yard-service employees" by stating that he "would say that they fit more nearly in with the yard-service employees than with any other class." R. 211-212; see also R. 213. The District Court observed that this "certainly is not a statement they [yardmasters] are members of that class [yard-service employees]. It implies that they are not, that they are not in any class mentioned in the statute but are more nearly related to the class of yard-service employees than any other class." R. 226.

Relying on the unconflicting testimony of "experienced railroad officials and representatives of railroad employees," the District Court found as a fact that "railroad usage * * * has never included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yardmen,' and yardmasters and assistant yardmasters have never been regarded as yard-service employees or yardmen." R. 233. The conclusion of law naturally followed that the disputes of yardmasters, not being subject to the jurisdiction of the First, Second, or Third Division of the National Railroad Adjustment Board, were subject to the catch-all jurisdiction of the Fourth Division. R. 233-234.

In reviewing the action of the District Court, the Circuit Court of Appeals came to the following conclusion (R. 274):

> "The testimony of all the witnesses did not differ materially with respect to the definition of 'yard-

service employees' as used by those engaged in the railroad business, and the court's finding adopted that definition."

Notwithstanding the foregoing express observation of the two courts below on the substantial uniformity of the testimony, the petition for certiorari is based primarily on an alleged conflict in the evidence as to the meaning in the railroad field of the decisive term, "yard-service employees." Petitioners assert that the trial court's finding was "drawn from *conflicting oral testimony.*" This could only mean that the trial judge who saw and heard the witnesses considered the alleged conflict and found from a preponderance of the evidence that the term "yard-service employees," as used in the railroad business, did not include the craft of yardmasters. On the other hand, however, the petitioners argue that both the courts below "overlooked" the alleged conflict. The fact of the matter, as their respective opinions show, is that both courts thoroughly considered all the testimony and found that it sustained the judgment rendered.

Documentary Evidence of the Meaning of the Term "Yard-Service Employees."

At the trial in the District Court the petitioners offered no documentary evidence to show the actual usage of the disputed term in the railroad business, from which the term was taken. For the first time, their briefs in the Circuit Court of Appeals made reference to two claimed examples of trade usage of the term. Since then their search in the vast library of railroad literature has yielded five more examples which are now offered in support of the petition for certiorari (pages 15-18). This material is the basis for the assertion on pages 5-6 of the petitioners' brief that the Interstate Commerce Commission and certain other agencies dealing with railroad matters have "repeatedly

recognized the term 'yard-service employees' as specifically inclusive of yardmasters." The facts do not substantiate that assertion.

Three of the petitioners' claimed examples are not instances of usage at all. These are No. 2 (Interstate Commerce Commission), No. 6 (Director-General of Railroads), and No. 7 (National Railroad Adjustment Board). Consequently, the agencies mentioned must be eliminated from the list. No. 2 (Interstate Commerce Commission) shows on its face that it has no bearing on the question. No. 6 (Director-General of Railroads) is a statement of the rates of pay for yard foremen when they perform substitute duty for yardmasters; yard foremen (the men in immediate charge of yard crews, also known as engine foremen or yard conductors, R. 193) are undoubtedly yard-service employees, and their disputes are referable to the First Division, whether or not they are acting as substitute or so-called "footboard yardmasters." No. 7 is a reference to the Index Digest of the awards of the First Division, in which, under the index heading "Yard Service," the subheading "Yardmaster" appears. Among the thirty other subheadings under "Yard Service" are "Road Crews —Switching or Other Work in Yards" and "Road Service." If the "Yardmaster" subheading proves that yardmasters are yard-service employees, by the same token road crews are also yard-service employees.[1]

[1] Examination of the awards listed under the subheading "Yardmaster" shows the reason for its inclusion in the index under the heading "Yard Service." Awards 5204, 5205, and 5206, for instance, are described in the Index Digest dated March 1, 1941 (page 347) as "Claims of brakemen and yardmen account *other than train or yard service employees* performing switching." (Italics supplied.) The published awards show that the employees designated as "*other than train or yard service employees*" were *yardmasters* and *yard clerks*. The petitioners' example No. 7 therefore proves the very opposite of their contention. Many like examples of the ordinary usage of the statutory term are shown in the Appendix, *infra*, pages 24-30.

Three more of the petitioners' examples [1] show use of the term "yard service" in connection with the presentation of statistical data only, in which for convenient summary or purposes of computation the small craft of yardmasters has been listed along with yard-service employees as a part of the great class of operating employees. Yardmasters are properly included among the operating employees, but they are not yardmen or yard-service employees. The Interstate Commerce Commission does not so classify yardmasters,[2] and, as the petitioners concede in their brief (footnote 8, page 16), the inexact "general designations" cited by them were abandoned in the reports of the National Mediation Board (which include the annual reports of the National Railroad Adjustment Board), after the Third Annual Report for the fiscal year ended June 30, 1937.

The petitioners' one remaining example is their No. 5 (page 17 of petitioners' brief), which is taken from a statement of a dispute submitted to an early adjustment board back in 1929. This is petitioners' only illustration of true railroad usage, by which we mean usage of the term by railroad men who actually conduct the railroad business, the men who developed the meanings of the terms "yard service" and "yard-service employees" which were current when the 1934 Act was passed and were adopted by Congress in writing the statute. This example speaks of certain yardmasters having been employed "*for* yard service." The meaning of the passage, especially the use of the word "for," is not clear, and it certainly is not evidence that yardmasters are embraced *within* the term "yard-service employees" in ordinary and general railroad usage.

[1] Nos. 1, 3, and 4 on pages 16-17 of their brief.

[2] See Appendix, *infra*, pages 28-30.

Respondents respectfully invite the Court to compare the probative value of that dubious single example with the many examples of the use of the decisive terms which respondents introduced at the trial in the District Court, some of which are set forth in the appendix to this brief. Those exhibits show clearly and convincingly, by means of actual everyday usage, what employees *are* known as yard-service employees, and that yardmasters *are not* generally so designated. The exhibits are excerpts from the records of proceedings before the National Railroad Adjustment Board and from publications of the Interstate Commerce Commission; they illustrate the common usage of the terms "yard service," "yard-service employees," and "yardmen" by railroad labor organizations, by the carriers, and by administrative agencies. For example, the Order of Railway Conductors, petitioner here, refers to a carrier having taken over "the employes in yard service *and the yardmasters* employed by the Standard Oil Company."[1] In another illustration, a carrier and the Brotherhood of Railroad Trainmen, the other petitioner here, speak of a yardmaster who "returned to yard service."[2] In still another, the Brotherhood of Railroad Trainmen complains of the use of supervisory forces, including yardmasters, to perform "yard service,"[3] and in another, the First Division in one of its awards refers to "yard service employees" deprived of their proper employment by the use of supervisory forces, namely, yardmasters.[4] The exhibits just referred to, and the others set forth in the appendix to this brief, have the special merit of showing the habitual and candid railroad usage of the synonymous terms "yard-service employees" and "yardmen," and the term "yard

[1] See Appendix, *infra*, page 24. Italics here, and in all subsequent quotations in this brief, have been supplied, unless otherwise noted.

[2] See Appendix, *infra*, page 25.

[3] See Appendix, *infra*, page 25.

[4] See Appendix, *infra*, page 27.

service," in circumstances quite unconnected with the present case or with the controversy that gave rise to the case, and obviously without any thought of adding to or subtracting from the accepted meaning of those terms. They prove conclusively that the term "yard-service employees," as taken by Congress from the language of railroad men, does not include yardmasters.

If consideration is to be given to documentary evidence of the meaning of the terms in question, as petitioners now urge, it is unnecessary to go beyond the petition and this reply to show that that evidence overwhelmingly supports the judgment below.

In connection with the foregoing showing it is to be borne in mind that the record shows without dispute that the terms "yard-service employees" and "yardmen" are synonymous. All of the witnesses so testified. The petitioners' witness testified on cross-examination as follows (R. 212):

> "Q. • • • Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard-service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?
>
> "A. Yes, sir."

The stipulation entered into by all parties and introduced as evidence at the trial (R. 155-170, 189) carefully distinguishes between the work performed by a yardmaster and the work performed by yard-service and other employees under the yardmaster's supervision. It distinctly recognizes that yardmasters are not yard-service employees in the following passage (R. 162):

> "*Yardmasters do not and may not perform the work of yardmen* and employees in train and engine service; they may perform some clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards."

The work of a yardmaster consists in directing and super-

vising the tasks performed within his jurisdiction by yard-service employees and by *numerous other crafts* whose members are not yard-service employees (R. 162, 163-164, 198, 213). Yardmasters are, therefore, not yard-service employees, for those are the employees who actually make up and break up trains and switch trains and cars in the yards (R. 191, 211, 212-213).

We submit that the District Court employed the correct method of statutory construction in ascertaining, as a fact, the meaning of a railroad term used in a statute dealing with railroad affairs. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364 (1926). The evidence on which the District Court's findings were based, and on which the Circuit Court of Appeals affirmed those findings, is manifestly substantial and without material conflict. Rule 52(a) of the Federal Rules of Civil Procedure provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Petitioners broadly assert that their arguments below were not given proper weight. It should be emphasized, therefore, that nothing submitted by any party was excluded, and that is was upon full consideration of the entire record by the Court of Appeals that it was held, not only that the conclusion of the District Court was responsive to the testimony of the witnesses, but that it was altogether consistent with the broad purpose and design of the statute as shown by its legislative history and by past practices. R. 274-277.

The Argument of Petitioners that Yardmasters Were Aligned With Yard-Service Crafts Prior to 1934.

Petitioners' statement in the brief (page 18) that yardmasters were in the past aligned with yard-service crafts for the submission of their disputes is quite inexact, both

in fact and in the implication it seeks to raise as to the meaning of the present statute. Under the various procedures employed in the settlement of disputes in the period before the existing law, some yardmasters' disputes were submitted to the same boards which decided the disputes of yard-service crafts and some were not. Prior to 1934, such adjustment boards as existed were set up by agreement between particular unions and particular carriers, and the result was that the disputes of those yardmasters and yard-service employees *who happened to belong to the same signatory organization* were heard by the board to which that organization and the carriers had agreed that all of that organization's disputes would be submitted. In short, the jurisdiction of the various boards was whatever the parties made it by their agreement. In actual practice the relatively few yardmasters who were members of the Order of Railway Conductors and Brotherhood of Railroad Trainmen had their disputes determined by the same board which heard the disputes of the yardmen who were members of those organizations. But the disputes of the rank and file of yardmasters who were members of other unions were heard by different boards.[1]

Prior to 1934, therefore, the whole machinery for resolving disputes was utterly different from the present system. It was the many unsatisfactory features of the old system that caused the enactment of the 1934 statute establishing jurisdiction, not on the basis of membership in par-

[1] The facts are stated in detail in the opinion of the Circuit Court of Appeals (R. 274-276), and the orders, regulations, and agreements referred to in the opinion are set forth in a collection of source materials made by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, entitled *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board* (Book One), *Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888-1940* (Book Two).

ticular labor organizations, but on the basis of defined crafts.

The factors which necessitated the basic changes in jurisdiction affected by the 1934 amendments were recently stated by this court as follows:

> "Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the power, if not the right, to defeat the intended settlement of grievances *by declining to join in creating the local boards of adjustment provided for by that Act.* They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. * * * To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.
>
> "The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. *Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them.* Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation." *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711.

The Court of Appeals commented upon this phase of petitioner's argument as follows (R. 276-277):

> "Under the Act of 1934, the jurisdiction of the Adjustment Board is not determined by representation or left to agreement; it is defined strictly in terms of disputes involving specified classes of employees, regardless of the labor affiliations of the members of the several classes. Under the present law, the several divisions of the National Adjustment Board were not created by signed agreement, but by statute which contains not a word to imply that the Order of Railway

Conductors and the Brotherhood of Railroad Trainmen may, or that the members of the Railroad Yardmasters must submit their disputes to the First Division.

"In view of these facts we think the District Court was correct in concluding that the historical alignment of yardmasters with the train and yard-service crafts in the settlement of disputes is not helpful in determining the question now before us."

The Claimed "Administrative Interpretation."

Petitioners rely upon "administrative interpretation," but the record shows that there has never been any settled administrative interpretation of the question here (*supra*, pages 5-7). This is the second of two court cases instituted by rival labor organizations to determine this jurisdictional controversy, for the very reason that there has never been any settled administrative practice in dealing with yardmaster cases, but only uncertainty and confusion.

In connection with their statement on this subject petitioners assert that difficulties will be experienced in the administration of the statute if a *yardmaster* complaining of a demotion to yardman is required to submit his dispute to the Fourth Division, while a *yardman* complaining of wrongful denial of promotion to a yardmaster position must submit his dispute to the First Division. But that condition exists in every instance in which jurisdiction of the disputes of supervising employees, and jurisdiction of the disputes of subordinates whom the yardmasters supervise, are lodged by the statute in different divisions. No such difficulties as those apprehended will be encountered once the question of jurisdiction is finally determined.

The submission of yardmen's disputes to one division, and the submission of yardmasters' disputes to a different division, is not only in strict conformity with the statute, but is a sensible and wholesome disposition of the matter. Such a division of assignments has actually been observed

for several years. Since 1938, when Judge Holly issued his first decree on the subject, the members of the Railroad Yardmasters of America, which represents the rank and file of the yardmasters, have submitted their disputes to the Fourth Division, while the disputes of yardmen who work under them have always been submitted to the First Division.

With respect to petitioners' argument on the alleged refusal of Congress to amend the Railway Labor Act so as to mention yardmasters specifically and exclude their disputes from the First Division, the Circuit Court of Appeals, observing that both bills went to a committee and were never reported out, concluded, properly we believe, as follows (R. 278-279):

> "Whether their demise by that method was due to the fact that the Committee thought they were undesirable or unnecessary we are not informed, and no presumption arises as to the cause."

Respondents pray that the petitions be denied.

Respectfully submitted,

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April 8, 1946.

APPENDIX.

Section 3 First (h) of the Railway Labor Act.

The respective jurisdictions of the four divisions of the National Railroad Adjustment Board are defined as follows in Section 3 First (h) of the Act, 45 U.S.C., Sec. 153 First (h):

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members,

five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

Documentary Exhibits Introduced at the Trial, Illustrating the Ordinary and General Railroad Usage of the Terms "Yard-Service," "Yardmen," and "Yard-Service Employees."

The exhibits here set forth were not included in the printed record on the appeal to the Circuit Court of Appeals, but by agreement they constituted a part of that record and were certified and transmitted to the Clerk of the Circuit Court of Appeals. R. 246-248, 251-254.

Award 4548 of the First Division (included in Plaintiffs' Exhibit K) was made in a dispute between the Order of Railway Conductors and the Elgin, Joliet and Eastern Railway Company. On the first page of the report of the award, under the heading "Position of Employes," the Order of Railway Conductors states that in 1934 the Railway Company—

> "took over the employes in yard service *and the yardmasters* employed by the Standard Oil Company."

In Docket 6406, First Division, *Order of Railway Conductors* v. *Chicago and North Western Railway Company*, the submission filed by the Conductors (Defendant's Exhibit 3) states the case of one Dunleavy, who was first employed as a brakeman, then as a conductor, and

was finally *promoted* to yardmaster in the Wood Street yard but thereafter, when that yard was closed down—

> "was required to *revert back* to yard and/or road service * * *."

In Docket 6837, First Division, *Brotherhood of Railroad Trainmen* v. *Chicago and North Western Railway Company* (Defendants' Exhibit 3-A), a joint statement signed by a division superintendent of the Railway Company and a local chairman of the Brotherhood of Railroad Trainmen, refers to Yardmaster Brazier, who displaced Yarmaster Meister—

> "'who in turn *returned to yard service* thus throwing Humm [a yardman] on the extra board.'"

Award 2065, First Division, related to a dispute between the Brotherhood of Railroad Trainmen and the Southern Pacific Company over the use of "*supervisory forces*" to perform "*yard service.*" The members of the "supervisory force" referred to by the Trainmen were "*Yardmasters* and other Supervisory force." Defendants' Exhibit 1-B, p. 1. Award 4466, First Division, related to a dispute between the Brotherhood of Railroad Trainmen and the Terminal Railroad Association of St. Louis over "use of yardmasters to perform the duties of yardmen." Defendants' Exhibit 1-E, p. 1. The dispute settled by Award 5816, First Division, *Brotherhood of Railroad Trainmen* v. *Missouri-Kansas-Texas Railroad Company*, was "account yardmaster performing *service for which yardmen are employed*" (Defendants' Exhibit 1-F, p. 1), and in the "Position of Employes" the Brotherhood of Railroad Trainmen made the following claim (Defendants' Exhibit 1-F, p. 2):

> "The Committee holds that the scope of the agreement *defines the class of employes known as yardmen, separating them from other classes of employees* for

the purpose of entering into agreements covering rates of pay, rules and working conditions applicable to yard switching.

"If it is the intent of the agreement to permit the Carrier to parcel its yard switching to *employes other than yardmen* there would be little need of a rule defining, classifying and separating yardmen from other employees.

"We submit that the Carrier's agreement with its yardmen involves valuable property rights in the form of seniority to its yardmen who should be given all yard work within the confines of their designated seniority territory. It is evident the Carrier declared definite intent of recognizing seniority rights of yardmen to all yard switching service when it entered into agreement with this Organization defining and classifying them as yardmen with established rates of pay and other rules designating and establishing segregated districts for yardmen to work and exercise seniority rights. *To construe such agreement as embracing less than all the yard service would render its yardmen's seniority rights and the current agreement of little or no value*, as the Carrier could parcel its yard switching to other groups of employes with the consequence that there would finally be nothing left which would be subject to the agreement with its yardmen."

In the submission leading up to Award 7355, First Division, *Brotherhood of Railroad Trainmen* v. *Texas and Pacific Railway Company*, the Trainmen accused yardmasters of performing specified items of "yard service." Defendants' Exhibit 1-G, p. 1.

The position taken by the Conductors and the Trainmen has also been taken by the Switchmen's Union of North America. See Defendants' Exhibit 1-A.

The carriers use the same language as the labor organizations. In Docket 11801, First Division (Defendants' Exhibit 3-B), the Brotherhood of Railroad Trainmen in its

submission states that one Thomas Estle worked as a "helper and/or foreman in charge of a crew in yard service" until he was made a yardmaster, and the Soo Line, in its submission, goes on to state that thereafter the yardmaster force was reduced and Estle—

"*returned to yard service* as a foreman and helper."

In Award 3609, First Division, *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Company*, the carrier's statement (Defendants' Exhibit 1-D, p. 3) speaks of certain yardmen who had been promoted to yardmaster positions and then, as a result of reduction in the yardmaster force,—

"*returned to yard service* in the exercise of their seniority rights under the Trainmen's Agreement."

The members of the First Division have in numerous cases used "yard-service employees" in a sense exclusive of yardmasters. Award 2065, as mentioned above (p. 52), settled a case in which the Trainmen complained of the use of "Yardmasters and other Supervisory force" to perform "yard service." The "Findings" of the First Division (Defendants' Exhibit, p. 36) contain the following language:

"This Division has rendered many awards denying Carriers the right to use supervising officers or others to perform the work of yardmen • • •.

"In the light of the consolidation agreement • • • that three yardmen should have been continued in service as herders, it is clear that *the yard service employes* involved in this dispute were deprived of service to which they were entitled and would have enjoyed had *supervisory forces* [that is, yardmasters] not been used to perform herders' work instead of yardmen."

See also Awards 1464, 1728, 3055, 4466, 5816, and 7355, all in the First Division (Defendants' Exhibits 1, p. 2; 1-A, p. 5; 1-C, p. 5; 1-E, p. 6; 1-F, p. 5; and 1-G, p. 35), in which

the First Division in its "Findings" used the same or substantially the same language as that just quoted.

The essential distinction between yardmasters and yard-service employees, in terms of the *supervision* performed by the first and the *yard service* performed by the second, was observed by the Fourth Division in the following passage in its opinion in Award 67, *Louisville and Nashville Railroad Company* v. *Railroad Yardmasters of America* (Defendants' Exhibit 1-H, p. 7):

> "During the period of construction of the Kentucky and Virginia Railroad, yard service under the supervision of a yardmaster was first established at Page, Kentucky, and later, when the line was built through to Lynch, Kentucky, yard service was established at Chad and Lynch, Kentucky, under the supervision of yardmasters located at Cumberland, Kentucky."

Illustrations of the Interstate Commerce Commission's use of "yard service" and "yard-service employees" are found in its report in *Ex Parte No. 106, Six-Hour Day Investigation*, 190 I.C.C. 750 (1932). Speaking of the Adamson Act, 39 Stat. 721, the Commission said (Defendants' Exhibit 2):

> "*Employees in road and yard service* * * *. In practice the provisions of that act have been applied to engineers, firemen, conductors, hostlers, baggagemen, brakemen, and flagmen in road and yard service."[1]

The Commission gives its own definition of "yard-service employees" in referring to certain rules—

> "applying to yard service employees—train and engine service, switch tenders, hostlers and hostler helpers— * * *."

The Interstate Commerce Commission's classification of railroad employees for reporting purposes is in accord with

[1] Italics not supplied.

the usage illustrated by the above quotations. This classification has been in effect since 1921, when the Commission issued an order with annexed rules entitled "Rules Governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation." See Intervenor's Exhibit 6, first page (unnumbered). These rules set up forms for reports, on which the various classes of employees are arranged according to so-called Reporting Division. Same Exhibit, numbered pages 6-11.[1] Explanatory instructions pertaining to the forms stated that the Reporting Divisions were to be in accord with the definitions of such Divisions given in the *Classification and Index of Steam Railroad Occupations* prepared by the United States Railroad Labor Board. Intervenor's Exhibit 1.

The classification to which reference is made appears in Intervenor's Exhibit 1. This classification divides all railroad employees into so-called "Services." Yardmasters and yardmen are not in the same service. The yardmaster group is found under "Supervisory Skilled Trades and Labor Service," in which "the preponderant duties of incumbents are to supervise or to assist in supervising the work of subordinate foremen and other employees * * *." Intervenor's Exhibit 1. Yardmen, or yard-service employees, are found in a distinct service called "Train and Engine Service," in which the duties are "to operate or to assist in the operation of trains and engines in road and yard service; or to handle locomotives in and around yards and engine houses when not in road or switching service." Intervenor's Exhibit 1. The employees known generically as yard-service employees are listed

[1] By an order of July 17, 1940, effective August 1, 1940, new numbers were assigned to the Reporting Divisions, but the method of reporting railway wage statistics was not changed. Intervenor's Exhibit 6, first two pages (unnumbered).

under the Yard Conductor and Yard Foreman Group, the Yard Brakeman and Yard Helper and Switchtender Group, the Yard Engineer and Motorman Group, the Yard Fireman and Helper Group, and the Hostler Group. Intervenor's Exhibit 1.